IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Bhagwati Narain.
vs.
Legal representatives of late Shri Ganesh Narain

S.B.CIVIL SECOND APPEAL NO.60/2007
UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 9.11.2006 PASSED BY SHRI PANKAJ BHANDARI, ADDITIONAL DISTRICT JUDGE NO.3, JODHPUR IN CIVIL APPEAL DECREE NO.16/2001.

DATE OF JUDGMENT ::: 23.2.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.Om Prakash Mehta, for the appellant.

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BY THE COURT:

Heard learned counsel for the appellant.

The appellant/defendant is aggrieved against the judgment and decree of the trial court dated 10.4.2001

decreeing the plaintiff's suit and dismissal of appeal by the first appellate court vide judgment and decree dated 9.11.2006.

Brief facts of the case are that plaintiff deceased Ganesh Narain Rathi filed a suit for eviction against his own brother defendant/appellant alleging that the suit property was originally belonging to one Maheshwar Nath and by agreement, that property was taken on rent by the plaintiff but in the year 1974, it was decided that for the suit premises, the defendant shall directly pay rent to said Maheshwar Nath. There were some conditions in the said agreement by which the landlord was to construct staircase and a wall. The said property was purchased by the plaintiff from said Maheshwar Nath by registered sale deed. The plaintiff, brother of the defendant, filed suit for eviction against the defendant as landlord being purchaser of property from defendant's landlord on the ground of personal bonafide necessity, denial of title as well as on the ground of default in payment of rent by the defendant. The suit was filed after giving notice to the defendant.

The defendant/appellant submitted that the father of plaintiff and defendant died in the year 1967 still joint Hindu family of defendant and plaintiff continued. The plaintiff was Karta Khandan of the joint

Hindu family and the defendant stated that as a karta khandan, the plaintiff purchased the suit premises from Maheshwar Nath. It is submitted by the defendant that in the year 1973, some doubts developed in the mind of the plaintiff and thereafter, the defendant separated the joint residence and started living in another house. It is also stated that the suit property in fact was purchased out of the joint Hindu family fund but in case, the plaintiff succeed in proving that the suit property was purchased by the plaintiff out of his funds, then also, the plaintiff is not entitled to rent for the suit premises because of the reason that the conditions and which were agreed by the predecessor in title – landlord Maheshwar Nath, have not been complied with. It was the specific case of the defendant that neither the plaintiff nor his predecessor in title was entitled to receive rent because of the reason that they did not provide way to basement nor they constructed partition wall.

The trial court rejected the defendant's case specifically about the purchase of the suit property from out of joint Hindu family funds and held that the defendant is tenant and is liable to be evicted from the suit property. The suit appears to have been filed in the year 1975 and it was decreed after about 25 years on 10.4.2001.

The regular first appeal was preferred by the

appellant obviously in the year 2001 which was dismissed on 9.1.2006 after about six years. The first appellate court upheld all the findings recorded by the trial court. Both the courts below were of the view that the defendant failed to prove that the suit property was purchased out of the joint Hindu family fund and the plaintiff proved that the defendant is now tenant of the plaintiff.

In second appeal, an application under Order 41 Rule 27 CPC has been filed by the appellant with his affidavit as well as affidavit of one Harivallabh s/o Sri Kishan Bhootra. By this application, the appellant sought permission to produce two documents – one alleged to have been executed on 10.9.1974 and that document is attested by notary public on 10.9.1974 and another document is copy of letter written to Burma Shell Company Ltd., Jaipur. This letter is undated and on plain paper.

In the application under Order 41 Rule 27 CPC, the appellant reiterated his defence that the suit property was purchased by the plaintiff out of joint Hindu family funds and though it was purchased in the plaintiff's name but that was because of the reason that he was karta of joint Hindu Family. The intention of the plaintiff became bad subsequently and, therefore, it was decided that the plaintiff and

defendant should separate joint Hindu family property. In that process, the elder brother-in-law of both the brothers i.e. brother-in-law of plaintiff and defendant namely, Sri Kishan Bhootra intervened and by this intervention, settlement was arrived at and later on, it was reduced in writing and that document was kept with late Sri Kishan Bhootra. The appellant submitted that the relationship of Sri Kishan Bhootra became strained with the appellant and, therefore, the document dated 10.9.1974 could not have been produced by the appellant. However, after death of Sri Kishan Bhootra, the appellant could obtain the original document from Harivallabh Bhootra son of late Sri Kishan Bhootra and is producing before this court along with the application under Order 41 Rule 27 CPC. In support of this contention, he submitted the affidavit of Shri Harivallabh Bhootra who stated that a few days ago, the appellant came to him and explained all the situation that in case, he is not helped, he is likely to be evicted from the suit premises. According to said Shri Harivallabh Bhootra, he was of the age of 17-18 years at the relevant time obviously in the year 1974, therefore, he had full knowledge of the facts. He stated that his both maternal uncles i.e. plaintiff and defendant are equal to him, however, after admitting that his late father was not in talking terms with the appellant. In the affidavit, the deponent fully

supported the case of the appellant.

It will be worthwhile to mention here that in the affidavit, he has not disclosed when his father died.

According to learned counsel for the appellant, the documents sought to be produced in the second appeal as additional evidence, are relevant for the purpose of deciding the issues already framed by the trial court and looking to the documents, it cannot be said that those documents which were executed as back as in the year 1974 are fabricated or forged one. It is also submitted that in various decisions of Hon'ble Supreme Court as well as of this Court, the view has been taken that in the matter of production of additional evidence, if the documents are relevant and necessary for deciding an issue or issues, then a liberal view be taken. It is also submitted that it is a case of grave hardship as the appellant being younger brother will be deprived of his rights in the suit property despite the fact that the suit property was purchased by the plaintiff out of joint Hindu family funds.

I considered the submissions of learned counsel for the appellant and perused the reasons given by the two courts below. Learned counsel for the appellant also provided copy of written statement.

It is clear from the written statement itself that so far as the property was originally belonging to Maheshwar Nath, there is no dispute. The suit property was originally taken on rent by the plaintiff is also not in dispute. According to the plaintiff due to differences between the plaintiff and the defendant, it was decided that the western portion of the shop will be kept with the defendant and the defendant will pay the rent for this portion to the landlord directly. The defendant in his written statement clearly mentioned that the dispute between two brothers cropped up in the year 1972. It is the case of the defendant himself that he is not liable to pay rent to the earlier landlord because of the reason that he did not comply with the conditions mentioned in the agreement namely, construction of way and putting partition wall in the shop. Therefore, the defendant accepted himself to be tenant in the suit premises of Maheshwar Nath is an admitted case. It has been proved by the plaintiff that he purchased the suit property by registered sale deed. The defendant took specific plea that the suit property was purchased out of joint Hindu family fund and he miserably failed to produce any sufficient evidence to prove that fact. Now the defendant in second appeal after more than 30 years is seeking to produce a document which is not registered and which is said to

be attested by notary public and which was in the knowledge of the defendant, if the affidavits of defendant and his witness Harivallabh, son of his brother-in-law, are considered. Apart from the fact that the defendant himself admitted that he was tenant of Maheshwar Nath from whom the plaintiff purchased the suit property, the defendant wants to set up a case in second appeal with the help of these documents which he has already set up before the trial court by specific pleading and did not choose to produce any evidence. The document which came in the hands of the defendant also is in suspicious circumstances because of the simple reason that neither the defendant/appellant nor the defendant's witness – close relative of the plaintiff and defendant, disclosed complete facts and one of the important fact was that when said Kishan Bhootra died. The statement of Harivallabh that his father had no talking terms with the appellant and now he himself had provided the original documents to the appellant and he gave his statement by way of affidavit in relation to the facts which only support the appellant and still he stated that both the maternal uncles are equal to him. In these suspicious circumstances, the documents sought to be produced which are not registered one and are coming after 31 years, cannot be taken on record.

Learned counsel for the appellant also submitted that where a family settlement is acted upon, then technicalities of law cannot come in the way. Here in this case, the appellant wants to not only produce the unregistered documents but want to reopen the entire trial to show that the family settlement in fact took place in the year 1974 and it was acted upon also.

In view of the above, the application under Order 41 Rule 27 CPC is liable to be dismissed, hence, dismissed.

It is also contended that the document dated 5.4.1974 was materially altered and, therefore, that document is void. The contention raised by the learned counsel for the appellant also do not construe any substantial question of law because of the fact that two courts below considered the document and the writing, which according to the appellant was altered/added.

On merits, two courts below have concurrently decided all questions of fact against the appellant and I do not find any substantial question of law involved in this appeal.

In view of the above, this second appeal deserves to be dismissed.

At this stage, learned counsel for the appellants prayed that some time may be granted to the appellant to vacate the suit premises.

I considered this prayer of learned counsel for the appellants and looking to the facts of the case, this Court is of the view that the appellant be granted time upto 31.12.2007 to vacate the suit premises.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 31.12.2007 and shall not part with the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decreetal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.1.2008. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court or pay directly to the landlord.

In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

In case, the respondent/decree holder will have any objection against granting time, then they will be free to move application before this Court for vacating the above order granting time to appellant.

With the aforesaid concession, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya